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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WENDELL RAY THOMAS,

Defendant and Appellant.

B205449

(Los Angeles County  
Super. Ct. No. VA089835)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Wendell Ray Thomas guilty of attempted murder with a firearm enhancement in the shooting of Jarrell Lewis in a Denny's parking lot. Thomas appeals, arguing that there was insufficient evidence that he intended to kill Lewis. We affirm.

### **BACKGROUND**

An amended information filed February 15, 2006 charged Thomas with attempted willful, deliberate, and premeditated murder in violation of Penal Code sections 664, 187, subdivision (a), and with personally discharging a firearm causing great bodily injury, in violation of Penal Code section 12022.53, subdivisions (b) through (d) (count 1). The information also charged possession of a firearm by a felon, in violation of Penal Code section 12021, subdivision (a)(1) (count 2). Thomas waived jury trial on the prior conviction allegation and admitted a prior felony for purposes of count 2, but pled not guilty to count 1.

At trial, the prosecution and the defense presented two opposing versions of the events outside a Denny's on Lakewood Boulevard, early in the morning of May 28, 2005. Thomas had arrived with friends, who were sitting inside at a table waiting to order when he went outside to smoke a cigarette. The victim, Lewis, testified that he had been drinking at a nightclub with two cousins. They stopped at the Denny's to use the bathroom, and Lewis and one cousin got out of the car. After he used the bathroom, Lewis was talking and joking with someone outside the Denny's when Thomas approached him and said, "I'm from Mona Park" (the name of a gang). Lewis answered, "Cross Atlantic Piru," another rival gang, although he was not a gang member. Thomas persisted, and Lewis laughed and said, "It's cool. I'm not tripping." Thomas went back inside the Denny's, and Lewis continued his conversation. A moment after, the door swung open, and Thomas began to shoot a gun at Lewis from fifteen feet away. Lewis began to run and realized he had been shot in the arm and chest. He ran across the street and into the path of an officer who had heard the shots and was driving his patrol car to the Denny's. The officer ordered Lewis to get down, and called the paramedics. He searched Lewis, who was unarmed.

Lewis's cousins ran up and were also searched and found to be unarmed. The cousins told the deputy that the shooter was a black male wearing a camouflage jacket who drove off in a silver Chevy Avalanche. Both cousins said they saw Lewis talking to the person wearing camouflage, both stated they saw the same person shoot at Lewis just outside the restaurant, and both later identified Thomas as the shooter. The deputies found five bullet casings no more than twenty feet from the front door of the Denny's, and an expended bullet was found in the street.

Meanwhile, Thomas had left the scene in the front passenger seat of a silver Chevy Avalanche driven by one of his friends. Deputies responding to a broadcast reporting the shooting and identifying the car, pulled the Avalanche over. Thomas was wearing a camouflage jacket as described in the broadcast. After he exited the car the deputies found a magazine clip on the floor of the front passenger area, and under the passenger's seat they found an unloaded handgun. A ballistics expert testified that the bullet casings found in the parking lot had been fired by that gun.

A deputy and expert on gangs testified that the verbal exchange described by Lewis could be construed as a challenge, and that laughing would be considered disrespect and could lead to an assault. The deputy had been assigned to investigate the shooting, and also testified that the driver of the Avalanche had told him that when Thomas got into the car after the shooting, Thomas said "I didn't want to shoot, but that slob was tripping." "Slob" was a derogatory gang term. (At trial, the driver denied making that statement.)

Thomas told a different story in his testimony. He said he was smoking outside of the Denny's with a friend when Lewis yelled, "Cross Atlantic Piru." He answered, "Man, you need to go on with that," and Lewis replied, "Shut up. I beat both of you all asses." Lewis then took off his jacket, approached Thomas, and said, "I'm Piru. I'll fuck you all up. I'll fuck you all up." Thomas had done nothing to provoke the confrontation. Lewis walked away, then returned, again threatening Thomas. Lewis retreated a second time, then came back and spit at Thomas, saying, "I'm Cross Atlantic Piru. You dead" and walked off. Thomas denied being a gang member.

Thomas and his friend went back into Denny's to tell the rest of his group to leave to avoid a fight. When Thomas opened the door to go he saw Lewis right there, lifting up an automatic weapon. Thomas had a firearm in his waistband "for safety." He faded back out of fear, pulled out the gun and fired it at Lewis. Lewis fell backward to one knee, then came back up, lifting his weapon. Thomas then shot Lewis again. Both men ran, and Thomas heard four more shots in quick succession. He feared for his life.

Thomas jumped into the truck, disarmed the weapon, and put it under the seat. The car drove off and the police stopped it a few minutes later, finding Thomas's weapon. No second weapon was ever found in the search of the parking lot and surrounding area.

The jury was instructed on attempted murder, attempted voluntary manslaughter, and self-defense. The jury found Thomas guilty of attempted murder and of the firearm charges, but not guilty of committing the attempted murder willfully, deliberately, and with premeditation. The trial court sentenced Thomas to 9 years in prison on count 1 (attempted murder), an additional 25 years to life for the firearm enhancement, and a two-year concurrent midterm on count 2 (felon in possession of a firearm) for a total of 34 years, as well as restitution and fines.

## **DISCUSSION**

Thomas argues that there was insufficient evidence of intent to support his conviction for attempted murder.

In evaluating a challenge to the evidence supporting the jury's verdict, we review the entire record in the light most favorable to the verdict for "evidence that is reasonable, credible and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Snow* (2003) 30 Cal.4th 43, 66.) We will reverse only if "it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We do not reweigh the evidence or redetermine the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

The crime of attempted murder requires the specific intent to kill and “the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) Intent is the same as express malice, which requires a showing that the defendant either desires the result (the death of the victim) or knows to a ““substantial certainty that the result will occur.”” (*People v. Davenport* (1985) 41 Cal.3d 247, 262.) There is rarely direct evidence of intent or malice, and so the intent to kill or express malice may be inferred from the defendant’s acts and the circumstances of the crime. (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690.) “The act of firing toward a victim at a close, but not point blank, range ‘in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill.’” (*Ibid.*) That inference does not require a further showing of any particular motive to kill the victim. (*People v. Smith* (2005) 37 Cal.4th 733, 743.)

There was ample evidence that Thomas intended to kill Lewis and committed a direct act toward that end. Thomas exchanged words with Lewis outside of Denny’s, entered the restaurant, and returned with a gun, firing multiple shots at Lewis from no more than 15 feet away. Thomas’s act of shooting at Lewis at a close range, which could have killed Lewis, is sufficient to support the jury’s conclusion that Thomas intended to kill. Although both Thomas and Lewis testified to gang-related vocabulary in their conversation, the prosecution was not required to show any particular motive for Thomas to shoot Lewis. The jury was entitled to judge the credibility of the witnesses and to believe Lewis’s account rather than Thomas’s story of self-defense, especially since the only weapon recovered was Thomas’s and all the bullet casings in the parking lot were from his gun. Sufficient evidence supported the jury’s verdict.

**DISPOSITION**

The judgment is affirmed.  
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WEISBERG, J.\*

We concur:

MALLANO, P. J.

ROTHSCHILD, J.

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\* Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.